No. 89-1686

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

SCHWEGMANN GIANT SUPER MARKETS, DELCHAMPS, INC., THE GREAT ATLANTIC AND PACIFIC TEA CO., INC., K&B, INC., NATIONAL TEA CO. AND WINN-DIXIE LOUISIANA, INC., *Petitioners*,

v.

BUDDY ROEMER, GOVERNOR OF THE STATE OF LOUISIANA, IN HIS OFFICIAL CAPACITY; ARNOLD A. BROUSSARD, SECRETARY OF THE LOUISIANA DEPARTMENT OF REVENUE AND TAXATION, IN HIS OFFICIAL CAPACITY; BRUCE N. LYNN, SECRETARY OF THE LOUISIANA DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS, IN HIS OFFICIAL CAPACITY; AND, LARRY DICKINSON, ASSISTANT SECRETARY OF THE LOUISIANA OFFICE OF ALCOHOLIC BEVERAGE CONTROL, IN HIS OFFICIAL CAPACITY, *Respondents*.

On Petition for a Writ of Certiorari to the Louisiana First Circuit Court of Appeal

BRIEF FOR THE RESPONDENTS IN OPPOSITION

DAVID OVERLOCK STEWART
(Counsel of Record)
RAYMOND C. ORTMAN, JR.
ROPES & GRAY
1001 Pennsylvania Ave., N.W.
Suite 1200 South
Washington, D.C. 20004
(202) 626-3900

CAMILLE GRAVEL
HELEN GINGER BERRIGAN
GRAVEL & BRADY
711 Washington Street
P.O. Box 1792
Alexandria, LA 71309-1792
(318) 487-4501
Attorneys for the Respondents

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: Page

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1686

SCHWEGMANN GIANT SUPER MARKETS, DELCHAMPS, INC., THE GREAT ATLANTIC AND PACIFIC TEA CO., INC., K&B, INC., NATIONAL TEA CO. AND WINN-DIXIE LOUISIANA, INC., *Petitioners*,

v.

BUDDY ROEMER, GOVERNOR OF THE STATE OF LOUISIANA, IN HIS OFFICIAL CAPACITY; ARNOLD A. BROUSSARD, SECRETARY OF THE LOUISIANA DEPARTMENT OF REVENUE AND TAXATION, IN HIS OFFICIAL CAPACITY; BRUCE N. LYNN, SECRETARY OF THE LOUISIANA DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS, IN HIS OFFICIAL CAPACITY; AND, LARRY DICKINSON, ASSISTANT SECRETARY OF THE LOUISIANA OFFICE OF ALCOHOLIC BEVERAGE CONTROL, IN HIS OFFICIAL CAPACITY, *Respondents*.

On Petition for a Writ of Certiorari to the Louisiana First Circuit Court of Appeal

---

BRIEF FOR THE RESPONDENTS IN OPPOSITION

CONSTITUTIONAL PROVISIONS

The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

U.S. Const. Amend. XXI, § 2

SUMMARY

This Court should not review the decision below, which was a correct and unremarkable application of the "state action immunity" doctrine announced in *Parker v. Brown*, 317 U.S. 341 (1943). Because the Louisiana

Beer Cash Law is pure state action, the Sherman Act does not apply here, as the Louisiana Court of Appeal held.

There are three other independent bases for sustaining the Louisiana Beer Cash Law, including (i) the statute satisfies the "two-step" test for state action immunity set out in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); (ii) the statute cannot be preempted by federal law when state restrictions on beer credit are expressly provided for by the Federal Alcohol Administration Act; and (iii) the statute is a proper exercise of the state's special powers over alcoholic beverages under the Twenty-First Amendment.

This Brief will stress several points that were entirely omitted from the Petition. First, we will describe the factual and legal context of "tied house" laws like the Louisiana Beer Cash Law. We then will review the Louisiana Court of Appeal's ruling based on *Parker v. Brown*, a key precedent which is never mentioned in the Petition. Finally, we will explain why the decision below was correct, why it can be sustained on three alternative grounds, and why this Court, like the Louisiana Supreme Court, should conclude that it is not worthy of review.

COUNTER-STATEMENT OF THE CASE

A. Louisiana, Like A Majority Of States, Combats "Tied House" Evils By Barring Credit On Beer Sales To Retailers

Louisiana is one of thirty-one states that prohibit credit on beer sales to retailers. *See* Appendix A to this Brief. Since Prohibition was repealed in 1933, both state and federal governments have closely restricted the relationship between beer wholesalers and retailers. Many states, like Louisiana, insist that retailers and wholesalers remain entirely independent, barring cross-ownership as well as loans, gifts, and credit between the two levels. *E.g.*, La. R.S. § 27:287 (DX 6, at 49-50).[1]

[1] "DX" refers to defendants' trial exhibits. "PX" refers to trial exhibits introduced by the Plaintiffs-Appellants.

Although petitioners allege that the Beer Cash Law has no public purpose, Pet. at 10, they never mention the finding of the Court of Appeal that the statute "serves a number of legitimate public goals," including increased stability and fairness in the marketplace. Pet. App. 15. A primary justification for the statute is the "tied house" problem which arises when retailers become "tied" to specific wholesalers or brewers. One congressman explained that federal tied house restrictions were "intended to prevent distillers, brewers, and wholesalers controlling the dispensation of whisky or beer, as the case may be, by exercising dominion and control over the place at which the liquor is sold." 79 Cong. Dec. 11717 (1935) (Rep. Treadway).

The tied house phenomenon raises several problems beyond the loss of choice for consumers and the increased market risks associated with credit. Many have considered the tied house a breeding-ground for political corruption. *E.g.*, Federal Alcohol Control Act: Hearings on H.R. 8539 Before the House Committee on Ways and Means, 74th Cong., 1st Sess. 10 (1935) (Statement of Chairman of Federal Alcohol Administration). Others have argued that the tied house encourages the proliferation of saloons and bars, 79 Cong. Rec. 14569 (1935) (Rep. McFarlane), and leads saloonkeepers and retailers to meet sales quotas by forcing "customers to buy drinks when they had already had quite enough." *Id.* at 11797 (Rep. Lewis). Others have argued that tied house arrangements produce irresponsible retailers. *See* Hearings, *supra*, at 119 (Sen. Connally).

These tied house evils convinced Congress that retailers and wholesalers must not become entangled. *National Distributing Co. v. U.S. Treasury Dept.*, 626 F.2d 997, 1009 (D.C. Cir. 1980). Accordingly, the Federal Alcohol Administration Act sharply restricts the links between retailers and wholesalers, *including the extension of credit by wholesalers.* 27 U.S.C. § 205(b)(6).

Many states also limit credit for beer retailers because of the tied house concerns. As the Illinois Supreme Court wrote in *Weisberg v. Taylor*, 409 Ill. 384, 100 N.E.2d 748, 750 (1951), "The mere statement of the proposition that the extension of credit by a creditor to a debtor does impose on the debtor an interest, supervision, power and influence on the part of the creditor proves itself." Citing the Massachusetts decision in *James J. Sullivan, Inc. v. Cann's Cabins, Inc.*, 309 Mass. 519, 36 N.E.2d 371 (1941), the Illinois court explained this justification for a Beer Cash Law: "Its purpose appears to have been to avoid the evils believed to result from the control of retail liquor dealers by manufacturers, wholesalers, or importers through the power of credit. Those evils do not, as a rule, depend upon the nature of the consideration out of which the credit arose. They depend upon the power of the creditor over the debtor." *See Neel v. Texas Liquor Control Board*, 259 S.W.2d 312, 316 (Tex. Civ. App. 1953) (writ ref. n.r.e.); *State v. Black Steer Steak House, Inc.*, 102 Wis. 2d 534, 537, 307 N.W.2d 328, 330 (App. 1981); *S.A. Discount Liquor, Inc. v. Texas Alcoholic Beverage Comm'n*, 709 F.2d 291, 293 (5th Cir. 1983).

The original Louisiana Beer Cash Law was enacted in 1948 after full consideration by the Louisiana Legislature. DX 1(b), No. 1 (Act No. 466). On sixteen different occasions between 1962 and 1987, legislation was introduced to repeal or suspend La. R.S. § 26:741. DX 1(b). None of these proposals was adopted. On six occasions the Legislature has considered bills to permit beer credit for up to 15 days. *Id.* Those bills also were not enacted. The Legislature again held hearings on this issue in early December. *See* Appendix B to this Brief.

Not only has the Louisiana Legislature refused to relax the Beer Cash Law, but also in 1979 it reaffirmed the statute by adopting a measure, now codified at La. R.S. § 27:287(9) (DX 6, at 49-50), which prohibits any

wholesaler from inducing a retailer to buy beer "by extending to the retail dealer credit." During deliberations of the House Committee on the Judiciary in 1979, the measure was described as an effort to eliminate "any under the table wheeling and dealing," and to "create a clean and straightforward industry . . ." DX 1(d), No. 1. Similarly, the Senate Committee on Judiciary heard testimony that the legislation would "prevent a wholesaler from tying in with a retailer whereby he will sell one brand of beer to the exclusion of another brand of beer." *Id.*

The regulations implementing the 1979 statute further emphasize this legislative policy. Regulation No. IX of the Louisiana Commission on Alcoholic Beverages prohibits wholesalers from inducing retail beer purchases by extending credit. The regulations announce a finding that the "tied house" restrictions in the beer industry have "brought stability to that industry, ha[ve] prevented unlawful and unfair inducements for the retail purchase of malt liquors, and ha[ve] prevented unlawful coercion, bribery, kickback demands, and other unfair and unlawful business practices from occurring." Rec. 367-69.[2]

---

[2] Petitioners claim that their economic expert testified that the price of beer is higher in those states that prohibit credit for beer retailers. Pet. at 5. But that expert conceded on cross-examination that his research revealed no "reliable" evidence that consumers pay more for beer under a Beer Cash Law. Rec. 531-32.

Indeed, beer wholesalers would face substantial credit costs if the Beer Cash Law were invalidated. One wholesaler projected increased costs exceeding 30 cents per case, DX 22, Rec. 603, 605-17, which he would have to pass on to his customers. Dr. Hair, the State's expert, confirmed this analysis, noting that smaller wholesalers likely would face even higher credit costs. Rec. 684-90, 692; DX 23-24. *See* PX 5. Petitioners themselves hold down their own credit costs; four of the petitioners refuse to extend credit to their customers, and a fifth extends credit only to commercial accounts. Rec. 332, 437, 445, 462-63.

B. Enforcement Of The Beer Cash Law In Louisiana

Petitioners attempt to characterize Louisiana's alcoholic beverage enforcement as a largely private affair, with beer wholesalers somehow orchestrating the regulatory effort. The record, however, reflects a vigorous program of purely public enforcement; indeed, the court below found that the "state has total and sole involvement" in Beer Cash Law enforcement. Pet. App. 12.

First, of course, the Legislature has specified precisely how much credit may be extended: none. Thus, wholesalers play no role whatever in determining credit policy. The Louisiana Legislature has made that decision.

The State maintains a vigorous enforcement program under the Beer Cash Law. The Office of Alcoholic Beverage Control ("ABC Office") employs both auditors and investigators to enforce the statute, and wholesalers as well as retailers are sanctioned for violations. *See* Rec. 501-02; PX 4, pp. 10-22, 26-29 (Flowers Deposition). During the twelve months from July 1, 1986 to June 30, 1987, the state found 1,356 first violations, 558 second violations and 83 third violations by retailers. DX 8. Wholesaler violations are discovered through self-reporting by wholesalers, state audits of wholesalers, investigations by state agents, or reports by competing wholesalers. Rec. 501-02, 563-77; PX 4, at 21-24 (Flowers Deposition). *See* PX 3, at 23 (Screen Deposition). Ten hearings on wholesaler violations were held over the last three years, and several resulted in sanctions. Rec. 572-73. The level of enforcement activity thus is roughly proportionate to the total numbers of retailers (19,000, DX 4) and wholesalers (only 85 in 1987, DX 3).

C. The Louisiana Court Of Appeal's Decision

In a fourteen-page opinion by Chief Judge Covington, the Louisiana Court of Appeal affirmed the trial court in upholding the Beer Cash Law. After setting forth the factual context for the litigation, the court reviewed the

reasoning in two "state action immunity" cases under the Sherman Act, *Parker v. Brown*, 317 U.S. 341 (1943), and *Hoover v. Ronwin*, 466 U.S. 558 (1984). The court observed that "state regulatory programs may impose anti-competitive restraints where they bear a rational relationship to a legitimate state objective," Pet. App. 9, and quoted the following language from *Parker v. Brown*, 317 U.S. at 352 (emphasis added):

> The state in adopting and enforcing [its] program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, *as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit.*

The Louisiana court concluded that *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980), is not relevant, explaining that *Catalano* involved a purely private agreement among private parties. In contrast, "The instant case presents no agreement among compet[]ing wholesalers. The action involved is solely state action . . . . No private economic actor is granted any degree of private regulatory power." Pet. App. 11.

The Court of Appeal also rejected petitioners' attempt to rely on *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), which involved a statute that gave some power over price to private parties (emphasis added):

> Such is not the case in the instant case. The state plays an active role. The state has total and sole involvement. The wholesalers have no participation or involvement in the determination that beer sales shall be for cash only. In *California Retail* the wine producer held the power to prevent price competition by dictating the prices charged by the wholesalers. *In this case the breweries have no power to dictate that beer sales shall be for cash or for credit. The beer wholesalers have no such power. Such determination is solely state action.*

The court added, "The evidence in the record of this case establishes no private sector involvement" in the decision to prohibit credit to retailers. Pet. App. 12.

The Court of Appeal also stressed the singular quality of alcoholic beverages which subjects them to extensive federal and state controls (Pet. App. 15) (emphasis added):

> They are the only commercial product specifically named in the United States Constitution. The State may and does regulate who can buy beer (not minors or intoxicated persons), who can sell beer at the retail level, who can sell beer at the wholesale level, and how close retailers may be located to schools, churches and similar structures, *In this context, the Cash Beer Law serves a number of legitimate public goals.*

The court identified these goals (Pet. App. 15-16):

(a) combatting "tied house" evils, by preventing the use of credit to "exclude competitors from [retail] outlets";

(b) controlling large retailers' market power;

(c) increasing wholesaler stability,

(d) increasing retailer stability.[3]

In their application for certiorari to the Louisiana Supreme Court, petitioners raised all of the points presented to this Court, plus Due Process and Equal Protection claims and an evidentiary complaint. Without a dissent, the Louisiana Supreme Court declined to grant certiorari.

---

[3] Petitioners twice point out that the Court of Appeal did not hear oral orgument (Pet. at 1, 10), as though the court therefore could not have devoted sufficient attention to the case. Petitioners do not reveal that they failed to request oral argument in a timely manner and thereby waived any right to oral argument. *See* Order dated 28 November 1988.

REASONS FOR DENYING THE WRIT

I. THE LOUISIANA COURT OF APPEAL CORRECTLY APPLIED *PARKER v. BROWN* IMMUNITY UNDER THE SHERMAN ACT

This case concerns pure state action to which state action immunity applies with special force. Petitioners hurry past this point and the basic rationale of the state-action immunity doctrine, thereby largely ignoring the reasoning of the court below.

As this Court has explained, "[T]he function of government may often be to tamper with free markets, correcting their failures and aiding their victims. . . ." *Fisher v. City of Berkeley*, 475 U.S. 260, 264 (1986). This "basic function" of government is often inconsistent with the Sherman Antitrust Act; consequently, when the state regulates markets to "correct[] their failures and aid[] their victims," the Sherman Act cannot apply. So long as state action is involved, cases involving purely private conduct, like *Catalano, Inc. v. Target Sales, Inc.*, *supra*, are irrelevant.

Petitioners seek to evade state action immunity by arguing that the Beer Cash Law does not satisfy the two-step test set forth in *Midcal* and applied in *324 Liquor Corp. v. Duffy*, 479 U.S. 335 (1987). As the Court of Appeal concluded, however, neither case applies here because the Beer Cash Law is "solely state action" and does not involve the exercise of any private discretion.

Midcal stressed that the California pricing program at issue "simply authorizes price setting and enforces the prices *established by private parties*," which involved "essentially a *private* price-fixing arrangement." 445 U.S. at 105-06 (emphasis added). If no private action were involved, by *Midcal's* own terms, its two-step test would not apply. As explained by the Supreme Court in *Fisher*, *supra*, the *Midcal* test for state-action immunity

applies only when there is a "hybrid" market situation, in which both the state and private parties have influence over price. 475 U.S. at 267-269.

Similarly, in *324 Liquor Corp.* New York's pricing system allowed wholesalers to manipulate "posted prices" to retailers to control the prices that retailers could charge, and the state then enforced those private pricing decisions. As the Court ruled, "The State has displaced competition among liquor retailers without substituting an adequate system of regulation." 479 U.S. at 345. Petitioners thus totally misstate *324 Liquor Corp.* by claiming that it held that the Sherman Act bars statutes that "mandate" anticompetitive behavior. Pet. at 17-18. The New York statute in *324 Liquor Corp.* was illegal because private wholesalers had discretion to set the posted price from which ultimate prices were calculated, and thereby to manipulate those ultimate prices. 479 U.S. at 339-40, 345. The illegality lay in the private power to set prices that the state would then enforce. If the New York statute had set the wholesale price of beer at $2.00 per six-pack and thus had established an "adequate system of regulation," state action immunity plainly would have attached.

Consequently, the two-step test of *Midcal* does not apply here, since the legislature has directed that no credit shall be extended to beer retailers. That state policy leaves no discretion in private hands, and is vigorously enforced only by state officials. *See* p. 6, *supra*. Thus, this case is the same as *Morgan v. Division of Liquor Control*, 664 F.2d 353 (2d Cir. 1981), which rejected an antitrust challenge to a Connecticut statute dictating a minimum markup on retail sales of alcoholic beverages. *Morgan* held that the law was state action because the state "establishes the markup and does not permit private parties" to control that markup, and the state "actively supervised" the implementation of the policy. *Id.*, at 355-56.

Similarly, *Traffic Jam & Snug, Inc. v. Michigan Liquor Control Comm'n*, 716 F. Suppp. 1024 (E.D. Mich. 1989), *aff'd*, 899 F.2d 15 (6th Cir. 1990), rejected a Sherman Act challenge to a Michigan statute barring beer retailers from acting as brewers. The federal court held that the flat prohibition on cross-ownership was "pure state action," designed to avoid the tied house evils, and therefore was immune from Sherman Act liability. The same reasoning applies to the Louisiana Beer Cash Law.

Petitioners mistakenly attempt to rely on *Miller v. Hedlund*, 813 F.2d 1344 (9th Cir. 1987), *cert. denied*, 484 U.S. 1061 (1988), which held that Oregon's price-posting statute was not immune from antitrust attack because it was not actively supervised by the state. *Miller* provides no support for petitioners here, however, because Oregon "allow[ed] private parties to set the prices" that were then enforced by the State. *Id.* at 1351.

In contrast, the Louisiana statute does not affect or limit private pricing discretion: beer wholesalers and retailers are free to increase or decrease their prices at any time, and the statute neither authorizes nor enforces these prices. Instead, the Louisiana statute simply prohibits the provision of credit to beer retailers. Within this narrow field that the state has chosen to regulate, moreover, the state's involvement is complete and utterly excludes private participation. This case, therefore, does not involve a "hybrid" regulatory scheme—present in *Miller*—in which the state grants to private actors "a degree of private regulatory power." *Id.* at 1350. Because the specific conduct at issue is that of the sovereign itself, the court below correctly decided that it "need not address the issues of 'clear articulation' and 'active supervision.'" *See Hoover v. Ronwin*, 466 U.S. 558, 569 (1984).[4]

---

[4] Petitioners offer the ingenious argument that the Beer Cash Law should be treated as a private price-fixing agreement because the terms of credit may be deemed one element of a product's

II. THE BEER CASH LAW SATISFIES *MIDCAL*'S TWO-STEP TEST

Although the state court had no occasion to reach this issue,[5] *Midcal* teaches that a "hybrid" regulatory scheme (which grants some discretion to both state and private actors) is entitled to state-action immunity so long as (1) the state policy is clearly articulated, and (2) it is "actively supervised" by the state. Petitioners do not argue that the Beer Cash Law fails the clear articulation requirement, so the only issue is whether the state "actively supervises" the policy.

This Court recently held that state action immunity applies when "state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy." *Patrick v. Burget*, 486 U.S. 94 (1988). That is precisely what happens here. The state investigates any credit activity and exercises its sanction power regularly. *See* p. 6, *supra.*

Petitioners argue that the active supervision requirement can be satisfied only if the state periodically under-

---

"price." Thus, petitioners argue, the state sets credit terms (supposedly one element of "price") and private parties set the actual price, resulting in a "hybrid" situation and not pure state action. Pet. at 24-25. This reasoning is entirely fallacious. By the petitioners' argument, the state excise tax on beer also would create a hybrid situation and potential Sherman Act liability; after all, the excise tax is set by the state and is part of the final price of beer, just as terms of credit can be deemed part of that price. As this example illustrates, petitioners cannot slap together pure state action with pure private action and conjure up a hybrid situation under *Midcal.*

[5] Because a judgment may be defended upon any ground established in the record, *United States v. New York Telephone Co.*, 434 U.S. 159, 166 n.8 (1977), and because this argument and our next two arguments were fully argued before the Louisiana courts, the judgment below could be modified only if we fail on all four of the contentions presented in this Brief.

takes a "pointed reexamination" of the Beer Cash Law. Pet. at 3, 11, 21-22, 24. In fact, the Louisiana Legislature has been engaged in nearly continuous reevaluation of the Beer Cash Law, since there have been 23 unsuccessful attempts to repeal or modify the statute since 1962. *See* pp. 4-5, *supra*. But this legislative activity does not satisfy petitioners, who apparently would require the State, at periodic intervals, to retain economists, statisticians and policy experts to conduct the "pointed reexamination." This Court's precedents, however, impose no such requirement.

A state certainly *may* choose to exercise active supervision by pursuing a "pointed reexamination" of the challenged policy. *E.g.*, *Midcal*, 445 U.S. at 105-106; *324 Liquor Corp.*, 479 U.S. at 343-345. But a pointed reexamination is simply one of the possible ways, and by no means the exclusive one, by which a state may supervise actively. *Midcal* noted that active state supervision could consist of (i) establishing prices, (ii) reviewing the reasonableness of price schedules, (iii) regulating the terms of fair trade contracts, (iv) monitoring market conditions, *or* (v) engaging in a pointed reexamination. 445 U.S. at 105-06. In this case, the state's active supervision includes setting credit terms and monitoring the market to enforce those terms. The pointed reexamination option thus is irrelevant here, where the state's supervision is complete.

III. THE BEER CASH LAW IS CONTEMPLATED BY—NOT PREEMPTED BY—FEDERAL LAW

The Louisiana statute cannot be preempted by the Sherman Act because the Federal Alcohol Administration Act ("FAA") expressly contemplates state credit restrictions and, in fact, imposes beer credit restrictions of its own.

Under 27 U.S.C. § 205(b)(6), Congress has directed that no wholesaler of alcoholic beverages may extend

credit to a retailer "for a period in excess of the credit period usual and customary to the industry for the particular class of transactions, as ascertained by the Secretary of the Treasury and prescribed by regulations by him." By federal regulation, the customary credit period for beer credit has been set at 30 days. 27 C.F.R. § 6.65. Under the "Penultimate Clause" of 27 U.S.C. § 205(f), however, that federal restriction applies only if "the law of such State imposes similar requirements with respect to similar transactions between a retailer . . . and a brewer, importer, or wholesaler of malt beverages." At trial, Earl Kennard, Regional Director of the federal Bureau of Alcohol, Tobacco and Firearms ("BATF"), explained that the Louisiana statute has been determined to trigger this federal credit limit on beer sales. Rec. 581.

Thus, in enacting the FAA, Congress anticipated and provided for state restrictions on beer credit. Louisiana, like 30 sister states, has prohibited beer credit to retailers. How, then, could another federal law be held to preempt Louisiana's restriction on beer credit? This Court has rejected preemption challenges to state statutes when the state action similarly was contemplated by a federal statute. *See Wardair Canada, Inc. v. Florida Department of Revenue*, 477 U.S. 1 (1986); *Hillsborough County, Fla. v. Automated Medical Labs, Inc.*, 471 U.S. 707 (1985).[6]

---

[6] Plaintiffs cannot take refuge in the slight variance between the federal 30-day restriction on beer credit and Louisiana's outright prohibition on credit. The penultimate clause of § 205(b) states only that the state restriction on beer credit must be "similar" to the federal restriction, and the federal BATF has determined that Louisiana's statutes are "similar" to the 30-day federal restriction. This Court has no basis for second-guessing that determination by BATF.

IV. THE TWENTY-FIRST AMENDMENT PROTECTS THE VALIDITY OF THE BEER CASH LAW

In repealing Prohibition, the Twenty-First Amendment reserved to the states extraordinary powers to regulate alcoholic beverages. As this Court recently held in *North Dakota v. United States*, No. 88-926 (May 21, 1990), at 6, "within the area of its jurisdiction, the State has 'virtually complete control' over the importation and sale of liquor and the structure of the liquor distribution system." (Plurality opinion of Stevens, J.); *see id.* at 5 (Scalia, J., concurring in judgment). When "the interests implicated by a state regulation are so closely related to the powers reserved by the Twenty-First Amendment," then the state regulation will prevail, notwithstanding "that its requirements directly conflict with express federal policies." *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 714 (1984).

In applying § 2 of the Twenty-First Amendment, a key criterion is whether the challenged state regulation has largely intrastate impact, or has a broader scope. *United States v. Frankfort Distilleries, Inc.*, 324 U.S. 293, 299 (1945), held that the Twenty-First Amendment "bestowed upon the states broad regulatory power over the liquor traffic *within their territories*." (Emphasis added.) *See Crisp, supra*, 467 U.S. at 713 ("the core § 2 power" of a state is to "regulate the sale or use of liquor within its borders"). A second key criterion is whether the state regulation concerns the structure of the liquor distribution system. *Midcal* observed that "there is no bright line between federal and state powers over liquor," but that the Twenty-First Amendment grants the States "virtually complete control over . . . *how to structure the liquor distribution system.*" 445 U.S. at 110 (emphasis added).

Applying these criteria, the Beer Cash Law is protected under the Twenty-First Amendment. *First*, the statute has solely intrastate impact; it affects only transactions between Louisiana wholesalers and Louisiana re-

tailers, all licensed by the state. Thus, unlike the pricing statutes in *Midcal* and *324 Liquor Corp.*, which controlled interstate sales, the Beer Cash Law is a purely intrastate matter, close to the "core § 2 power."

Second, the Beer Cash Law is expressly designed to control the structure of the state's beer distribution system by preventing entanglement of retailers and wholesalers, and is therefore within the "virtually complete control" that states can exercise in structuring beer distribution. *Midcal*, 445 U.S. at 110. *S.A. Discount Liquor, Inc. v. Texas Alcoholic Beverage Comm'n*, 709 F.2d 291 (5th Cir. 1983), upheld under the Twenty-First Amendment the Texas prohibition against a beer retailer also holding a beer wholesaler license. *S.A. Discount Liquor* held that because the Texas statute aimed to prevent the tied house evils in beer distribution, it was within the state's Twenty-First Amendment powers. 709 F.2d at 294.

CONCLUSION

For all of the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

DAVID OVERLOCK STEWART
(Counsel of Record)
RAYMOND C. ORTMAN, JR.
ROPES & GRAY
1001 Pennsylvania Ave., N.W.
Suite 1200 South
Washington, D.C. 20004
(202) 626-3900

CAMILLE GRAVEL
HELEN GINGER BERRIGAN
GRAVEL & BRADY
711 Washington Street
P.O. Box 1792
Alexandria, LA 71309-1792
(318) 487-4501

Attorneys for the Respondents

May 30, 1990

APPENDICES

APPENDIX A

STATES PROHIBITING CREDIT ON BEER SALES FROM WHOLESALERS TO RETAILERS

Alabama	Alabama Beverage Control Board Reg. 17; Alabama Administrative Code Ch. 20-x-8-.11
Arizona	Arizona Revised Statutes § 4-242
Arkansas	Arkansas Alcohol and Beverage Control Regulations, Subtitle F, § 2.29
Georgia	Georgia Compilation of Rules and Regulations, Ch. 560-2-2-.17
Idaho	Idaho Code § 23-1031
Indiana	Indiana Code § 7.1-5-10-12
Iowa	Iowa Code § 123.45
Kansas	Kansas Statutes § 41-702
Kentucky	Kentucky Revised Statutes § 244.040
Louisiana	Louisiana Revised Statutes § 26:741
Maine	Maine Revised Statutes title 28-A, § 707
Maryland	Maryland Ann. Code art 2B, §§ 120-130 (covering 18 of 23 counties); Maryland Regs. Code title 3, § 03.02.01.04
Michigan	Michigan Compiled Laws § 436.16
Minnesota	Minnesota Statutes § 340A.308
Mississippi	Mississippi Code § 67-1-79
Nebraska	Nebraska Revised Statutes § 53-168
North Carolina	North Carolina General Statutes § 18B-1116
North Dakota	North Dakota State Treasurer Off. Rule 8; North Dakota Admin. Code § 84-02-01-10
Ohio	Ohio Revised Code § 4301.24 (Baldwin)
Oklahoma	Oklahoma Statutes title 37, § 535

Oregon	Oregon Revised Statutes § 471.485
Pennsylvania	Pennsylvania Statutes title 47, § 4-493 (2)
South Carolina	South Carolina Code § 61-3-920
South Dakota	South Dakota Dept. of Revenue Reg. 35-801; South Dakota Admin. Rules § 64:75:08:01
Tennessee	Tennessee Code § 57-6-108
Texas	Texas Alco. Bev. Code Ann. § 102.31
Vermont	Vermont State Liquor Control Board Reg. Credit 2(a)
Virginia	Virginia Code Ann. § 4-60
Washington	Washington Revised Code § 66.28.010
West Virginia	West Virginia Non-Intoxicating Bev. Comm. Reg. No. 24; West Virginia Code of State Rules § 176-1-8
Wyoming	Wyoming Statutes § 12-5-402

APPENDIX B

Times-Picayune (Dec. 6, 1989)

BEER LAW TO STAY ON LA. BOOKS

By The Associated Press

BATON ROUGE—Grocers won't be getting help from a legislative panel that decided Tuesday not to recommend any change in an old law requiring retailers to pay cash for beer from wholesalers.

Grocers routinely buy items on credit but are stymied on beer purchases by a law passed at the insistence of Gov. Earl Long in the 1940s.

Long pushed through increases in the beer tax and wanted no problems in collecting, so the law called for the cash-only stipulation, the committee was told.

Because they are cash transactions, beer deliveries interrupt a grocer's normal routine of receiving goods from vendors, punching the information into a computer and cutting a check later in the week or month, said William Gourgues, an executive with Rouse's Supermarkets.

Gourgues said a retailer study showed that the special handling costs the five-store Rouse's chain $24,400 a year in lost productivity.

He also estimated that three beer wholesalers that serve the five Rouse's stores lose almost $13,900 a year in time that drivers spend handling cash payments.

George Brown, lobbyist for the Beer Industry League, said credit would give large wholesalers and large retailers an unfair competitive edge.

Large national breweries would be most capable of extending credit to retailers, and if a large brewery offers unlimited credit to a retailer, the brewery would be in a

position to dictate what brands of beer the retailer could carry, Brown said.

In addition, Brown said, credit costs money and the increased beer prices would end up being borne by consumers and small stores that wouldn't qualify for credit.

Rep. Juba Diez, D-Gonzales, chairman of the study committee, said his panel decided against recommending any changes.